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ARIZONA SUPREME COURT

In the Matter of:)	
)	
REPLY TO THE PETITION TO)	Supreme Court No. R-11-0023
AMEND RULES 7, 8, 10, 10.1, 10.2, 15.1,)	(Expedited Adoption Requested)
15.2, 18, 19, 22,26, 26.1, 27.1, 28, 29, 29.2,)	
30, 30.1, 30.2, 30.3, 30.4,33, 38, <i>Rules of</i>)	
<i>Probate Procedure and Rule 31, Rules of</i>)	
<i>the Supreme Court</i>)	

I. Introduction

On July 19, 2011, Administrative Office of the Courts (AOC) staff, on behalf of the Arizona Judicial Council (Council), filed Rule Petition R-11-0023 which contains numerous proposed rule amendments and new rules pertaining to the administration of guardianship, conservatorship, and decedent estate cases. The rule petition represents a culmination of the work performed by the Committee on Improving Judicial Oversight and Processing of Probate Matters (Committee), commissioned by the Chief Justice in April, 2010 to consider and make recommendations regarding: (1) ways to streamline the process when an incapacitated or vulnerable child reaches the age of majority and is need of a guardian and/or conservator; (2) effective court oversight and monitoring of guardianships, conservatorships, and decedent estate cases; (3) statewide fee guidelines for professional fiduciaries and attorneys paid from a ward's or protected person's estate; and (4) the process used by courts to review and award fiduciary and attorney fees, particularly when disputed.

The Arizona Judicial Council initially discussed the Committee's report and corresponding 32 recommendations on June 20, 2011 and, at that time, directed AOC staff to file

the rule petition. At its next meeting, on October 28, 2011, the Council engaged in a detailed review and discussion of the Committee's report and took action on each of the recommendations. As part of that discussion and deliberation of the Committee's report and recommendations, the Council considered the comments received on the rule petition. This reply represents the Council's recommended action on each of the proposed rule amendments and new rules contained in the above-noted rule petition.

II. GENERAL EFFECTIVE DATE

As evidenced by the length of the rule petition and the numerous proposed changes and additions to existing probate rules, the Council acknowledges that it is not practical to prescribe the same general effective date for each and every rule requirement. Throughout this document, the Council has identified those proposed rule changes or additions which will require a delayed effective date. However, unless otherwise specified, the Council recommends the supreme court prescribe a general effective date of from and after February 1, 2012.

III. REPLY TO PROPOSED RULE CHANGES

A. Rule 7. Confidential Documents and Information

1. The Council recommends approving the proposed amendment to Rule 7, with modified language. In particular, the Council recommends revising proposed Rule 7 (A)(1)(C) to read as follows.

~~“Risk assessments, good faith estimates and b~~Budgets filed pursuant to Rules ~~30, 30.1, 30.3, and 30.4~~, Arizona Rules of Probate Procedure.”

Comment: The above-noted recommended language change is due to the Council's recommendation against adopting by rule, the Good Faith Estimates and Risk Assessment tool, as proposed in Rule 30.1 and Rule 30(D), respectively. Rather, the Council recommends the Chief Justice authorize pilot testing of the Good Faith Estimates and the Risk Assessment tool by Administrative Order.

B. Rule 8. Service of Court Papers.

1. The Council recommends approving the proposed amendment to Rule 8, as written in the rule petition.

C. Rule 10. Duties Owed BY COUNSEL, FIDUCIARIES, UNREPRESENTED PARTIES, AND INVESTIGATORS.

1. The Council recommends against approving proposed Rule 10(C)(1)(b).

Comment: The Committee provided two options/recommendations for determining the duties a fiduciary may perform without an attorney. The Council recommends authorizing these duties in Rule 31 (which will be addressed later in this document) and enumerating the duties within the Arizona Code for Judicial Administration.

2. The Council recommends approving proposed Rule 10(C)(4) as written in the rule petition.
3. The Council recommends against approving proposed Rule 10 (D)(1).

Comment: The Committee provided two options/recommendations for determining the duties a fiduciary may perform without an attorney. The Council recommends authorizing these duties in Rule 31 (which will be

addressed later in this document) and enumerating the duties within the Arizona Code for Judicial Administration.

4. The Council recommends approving proposed Rule 10(E)(1) and Rule 10(E)(2); however, the Council recommends the following modified language for proposed Rule 10(E)(1):

“Initial training. Any attorney who serves as a court-appointed attorney or guardian ad litem for a proposed adult ward or adult protected person must first complete a training course prescribed by the supreme court, which will issue a certificate of completion. The attorney must file a copy of the certificate of completion with the COURT MAKING THE APPOINTMENT ~~administrative office of the courts or the supreme court’s designee~~ no later than ten days after entry of the appointment order. Any attorney who, at the time this rule becomes effective, is serving as a court-appointed attorney or guardian ad litem for an adult ward or protected person must complete a training course prescribed by the supreme court as soon as practicable and thereafter must file a certificate of completion with the COURT WHICH MADE THE APPOINTMENT ~~administrative office of the courts or the supreme court’s designee.~~”

Additionally, the Council recommends these proposed rules should take effect from and after September 1, 2012 to allow sufficient time to develop the training and implementation procedures.

5. The Council recommends proposed Rule 10(F)(1) and proposed Rule 10(F)(2); however, the Council recommends the following modified language for proposed Rule 10(F)(1):

“Before being appointed as an investigator pursuant to A.R.S §§ 14-5303(C), 14-5407(B), or 36-540(G), a person must first complete a training course prescribed by the supreme court, which will issue a certificate of completion. The investigator must file a copy of the certificate of completion with the COURT MAKING THE APPOINTMENT ~~administrative office of the courts or the supreme court’s designee.”~~

Additionally, the Council recommends this proposed rule should take effect from and after September 1, 2012 to allow sufficient time to develop the training and implementation procedures.

D. RULE 10.1. FIDUCIARY’S AUTHORITY TO FILE DOCUMENTS AND APPEAR IN COURT PROCEEDINGS WHEN REPRESENTED BY COUNSEL.

1. The Council recommends against approving proposed Rule 10.1.

Comment: The Committee provided two options/recommendations for determining the duties a fiduciary may perform without an attorney. The Council recommends authorizing these duties in Rule 31 (which will be addressed later in this document) and enumerating the duties within the Arizona Code for Judicial Administration.

E. RULE 10.2. PRUDENT MANAGEMENT OF COSTS

1. The Council recommends approving proposed Rule 10.2 as written in the rule petition.

F. RULE 15.1 APPOINTMENT OF GUARDIAN AD LITEM.

1. The Council recommends approving proposed Rule 15.1 as written in the rule petition.

G. RULE 15.2. INVOLUNTARY TERMINATION OF APPOINTMENT; OTHER REMEDIES FOR NON-COMPLIANCE; DISMISSAL; SANCTIONS.

1. The Council recommends approving proposed Rule 15.2 with the following modified language to Rule 15.2(A)(2):

“The clerk of the court or court administrator, whoever is designated by the presiding judge, shall promptly notify parties, THOSE HEIRS AND DEVISEES WHOSE ADDRESS IS CONTAINED IN THE FILE, ~~heirs,~~ ~~devisees,~~ and all who demand notice in the case of the impending dismissal of the case....” (The proposed language within the remainder of this proposed rule should be approved as written in the rule petition).

Comment: In its final report, the Committee noted the proposed rule requires the clerk of the court to provide the notice of impending dismissal to heirs and devisees. The Council discussed and agreed to revise the language in the proposed rule to clarify that a clerk of the

court would only be required to notify those heirs and devisees for whom the court already has an address on file.

H. Rule 18. Motions.

1. The Council recommends approving amendments to Rule 18 as written in the rule petition.

I. Rule 19. Appointment of Attorney, Medical Professional, and Investigator.

1. The Council recommends approving amendments to Rule 19 as written in the rule petition.

J. Rule 22. ORDERS APPOINT CONSERVATORS, GUARDIANS, AND PERSONAL REPRESENTATIVES; Bonds and Bond Companies; RESTRICTED ASSETS.

1. The Council recommends approving amendments to Rule 22 as written in the rule petition.

K. Rule 26. Issuance AND RECORDING of letters.

1. The Council recommends approving amendments to Rule 26 as written in the rule petition.

L. RULE 26.1. WRITTEN FINDINGS ON APPOINTMENT.

1. The Council recommends approving proposed Rule 26.1 as written in the rule petition.

M. RULE 27.1. TRAINING FOR NON-LICENSED FIDUCIARIES.

1. The Council recommends approving proposed Rule 27.1 with the following modified language to 27.1(A):

“Any person who is neither a licensed fiduciary under A.R.S. § 14-5651 nor a financial institution shall complete a training program approved by the supreme court before letters to serve as a guardian, conservator, or personal representative are issued unless the appointment was made pursuant to sections 14-5310(a), 14-5401.01(a) or 14-5207(c) OR UNLESS OTHERWISE ORDERED BY THE COURT.”

Additionally, the Council recommends this proposed rule should take effect from and after September 1, 2012 to allow sufficient time to develop the training and implementation procedures.

N. Rule 28. Pretrial Procedures.

1. The Council recommends approving amendments to Rule 28 as written in the rule petition.

O. Rule 29. ~~Arbitration~~ ALTERNATIVE DISPUTE RESOLUTION.

1. The Council recommends approving amendments to Rule 29 as written in the rule petition.

P. RULE 29.2. REMEDIES FOR VEXATIOUS CONDUCT; DEFINITIONS

1. The Council recommends approving proposed Rule 29.2 as written in the rule petition.

Q. Rule 30. Guardianships/Conservatorships-Specific Procedures

1. The Council recommends approving amendments to Rule 30 with the following modified language to Rule 30(B)(3):

“Unless otherwise ordered by the court, the conservator’s account shall be filed in the format set forth in the appropriate form contained in THE ARIZONA CODE OF JUDICIAL ADMINISTRATION.”

Additionally, the Council recommends the proposed language in Rule 30(B)(3) should take effect from and after September 1, 2012 to allow sufficient time for staff to review the proposed forms, make any necessary revisions to the forms, present the forms to the Council for approval, and to make the forms available on the judicial branch’s website.

Comment: The Council agreed placing any approved forms in the administrative code, rather than court rule, provides a more efficient mechanism to revise such forms at a later date, if necessary.

2. The Council recommends against approving proposed Rule 30(D) at this time to allow for further evaluation and testing of the proposed risk assessment tool and post-appointment review process.

Comment: The Council discussed the status of the proposed risk assessment tool and the fact the tool has not been fully tested or validated. As such, the Council agreed more time is needed to test the risk assessment tool, revise and re-test the tool if necessary and to pilot the entire post-appointment review process to assess the feasibility of implementing on a statewide basis.

R. RULE 30.1. GOOD FAITH ESTIMATE

1. The Council recommends against approving proposed Rule 30.1. Rather, the Chief Justice should allow counties to pilot the good faith estimate process and proposed Form 5 through an Administrative Order.

Comment: As noted in the Committee's final report and as provided in the public comments to the rule petition, the Committee's recommendation to require a good faith estimate at the time a petition for appointment as a conservator is filed was a controversial issue. The Committee itself was divided on the issue, and virtually all the rule petition comments on this proposed rule urged the Court not to adopt this proposed rule. The Council discussed this issue in detail at its October 28, 2011 meeting and decided not to recommend adopting the rule, but agreed that if a court desired to test the process, the court could make a request to the Chief Justice to issue an administrative order authorizing a pilot test.

S. RULE 30.2. FINANCIAL ORDER

1. The Council recommends approving proposed Rule 30.2 as written in the rule petition, but with a delayed effective date of from and after September 1, 2012 to allow time to review and revise the forms (if necessary).

Comment: As previously noted, a delayed effective date will allow sufficient time for staff to review the proposed forms, make any necessary revisions to the forms, present the forms to the Council for approval, and to make the forms available on the judicial branch's website.

T. RULE 30.3. SUSTAINABILITY OF CONSERVATORSHIP

1. The Council recommends approving proposed Rule 30.3 with the following modified language:

“RULE 30.3: SUSTAINABILITY OF
CONSERVATORSHIP

A. THE CONSERVATOR SHALL DISCLOSE WHETHER THE ANNUAL EXPENSES OF THE CONSERVATORSHIP EXCEEDED INCOME AND, IF SO, WHETHER THE ASSETS AVAILABLE TO THE CONSERVATOR LESS LIABILITIES ARE SUFFICIENT TO SUSTAIN THE CONSERVATORSHIP FOR THE DURATION OF TIME THE PROTECTED PERSON NEEDS CARE OR FIDUCIARY SERVICES.

B. THE ESTATE SUSTAINABILITY SHALL BE CALCULATED AS FOLLOWS:

$$\frac{(\text{AVAILABLE ASSETS MINUS LIABILITIES OF THE ESTATE})}{(\text{ANNUAL EXPENDITURES MINUS ANNUAL INCOME})} = \text{ESTATE SUSTAINABILITY}$$

C. IF THE ASSETS ARE NOT SUFFICIENT TO SUSTAIN THE ESTATE, THE CONSERVATOR SHALL ALSO DISCLOSE THE MANAGEMENT PLAN FOR THE NON-SUSTAINABLE CONSERVATORSHIP.

D. THE INFORMATION REQUIRED BY THIS RULE SHALL BE A GOOD FAITH PROJECTION BASED UPON THE INFORMATION THAT IS REASONABLY AVAILABLE TO THE CONSERVATOR CONCERNING THE SUBJECT PERSON. THIS INFORMATION MAY BE CONSIDERED BY THE COURT WHEN ENTERING ORDERS.

E. UNLESS OTHERWISE ORDERED BY THE COURT, THE CONSERVATOR SHALL DISCLOSE THE INFORMATION REQUIRED BY THIS RULE, INCLUDING THE CONSERVATOR'S ASSUMPTIONS AND CALCULATION, WHEN FILING AN INVENTORY, ANY CONSERVATOR'S ACCOUNT, AND FOLLOWING ANY MATERIAL CHANGE OF CIRCUMSTANCES.

F. UNLESS OTHERWISE ORDERED BY THE COURT, THE SUSTAINABILITY DISCLOSURE SHALL BE FILED IN THE FORMAT SET FORTH IN THE ARIZONA CODE OF JUDICIAL ADMINISTRATION.

G. THE DISCLOSURE REQUIRED BY THIS RULE IS NOT REQUIRED IN THE CONSERVATORSHIP FOR A MINOR UNLESS OTHERWISE ORDERED BY THE COURT.

COMMENT

THE PURPOSE OF THE DISCLOSURE REQUIRED BY THIS RULE IS TO PROVIDE THE COURT AND PARTIES WITH A GENERAL IDEA AS TO WHETHER THE ASSETS AND INCOME OF THE CONSERVATORSHIP ESTATE ARE SUFFICIENT TO PAY FOR THE PROTECTED PERSON'S EXPENSES FOR THE DURATION OF TIME THE PROTECTED PERSON NEEDS CARE AND FIDUCIARY SERVICES. THUS, THE DISCLOSURE REQUIRED BY THIS RULE IS INTENDED TO SERVE SOLEY AS A

MANAGEMENT TOOL; THE COURT DOES NOT INTEND THAT A GOOD FAITH PROJECTION WILL FORM THE BASIS FOR A CLAIM OF LIABILITY AGAINST THE CONSERVATOR.

THE FOLLOWING EXAMPLE DESCRIBES HOW THE REQUIRED DISCLOSURE IS CALCULATED: ASSUME A PROTECTED PERSON'S ESTATE CONSISTS OF \$20,000 IN BANK ACCOUNTS AND A RESIDENCE WITH A FAIR MARKET VALUE OF \$120,000 AND A \$65,000 MORTGAGE. FURTHER, ASSUME THAT SAME PROTECTED PERSON HAS AN ANNUAL INCOME OF \$20,000 AND ANNUAL EXPENSES (INCLUDING FIDUCIARY AND ATTORNEY FEES) OF \$45,000. THE CONSERVATORSHIP'S SUSTAINABILITY IS CALCULATED AS FOLLOWS:

$$\frac{(\$120,000 + \$20,000 - \$65,000)}{(\$45,000 - 20,000)} = \text{ESTATE SUSTAINABILITY}$$

$$\frac{\$75,000}{\$25,000} = \text{ESTATE SUSTAINABILITY OF 3 YEARS}$$

THUS, IF BASED ON THE CONSERVATOR'S KNOWLEDGE OF THE PROTECTED PERSON'S MEDICAL CONDITION AND AGE, THE CONSERVATORSHIP IS NOT SUSTAINABLE, THE CONSERVATOR MUST EXPLAIN HOW THE PROTECTED PERSON'S EXPENSES WILL BE MANAGED AFTER THREE YEARS.

Additionally, the Council recommends the proposed rule should take effect from and after September 1, 2012 to allow sufficient time to for staff to review the proposed forms, make any necessary revisions to the forms, present the forms to the Council for approval, and to make the forms available on the judicial branch's website.

Comment: The Committee's recommendation to require a conservator to indicate the protected person's life expectancy when calculating estate sustainability garnered a number of comments in the public comments to the rule petition as well as significant discussion among the Committee and the Council at its last meeting. Comments received on this proposal suggested including life expectancy when assessing estate sustainability is a difficult calculation for the medical profession and actuaries, let alone licensed fiduciaries and the family members who often serve as conservators for their loved ones. The Council determined the court should consider the sustainability of the estate itself, not the sustainability of the protected person. As such, the Council recommends the modified language indicated above, which maintains much of the Committee's intent for the court to consider sustainability, but removes any requirement to quantify on the proposed form, the protected person's life expectancy.

U. RULE 30.4. CONSERVATORSHIP ESTATE BUDGET

1. The Council recommends approving proposed Rule 30.4 with the following modified language to Rule 30.4(B) and Rule 30.4(D):
 - a. Rule 30.4(B): "Unless otherwise ordered by the court, the conservator's account shall be filed in the format set forth in the appropriate form contained in THE ARIZONA CODE OF JUDICIAL ADMINISTRATION."

The Council further recommends the proposed rule should take effect from and after September 1, 2012 to allow sufficient time to for staff to review the proposed forms, make any necessary revisions to the forms, present the forms to the Council for approval, and to make the forms available on the judicial branch's website.

Comment: As previously noted, the Council agreed placing any approved forms in the administrative code, rather than court rule, provides a more efficient mechanism to revise such forms at a later date, if necessary.

b.

R

ule 30.4(D): “The conservator shall file an amendment to the budget and provide notice in the same manner as the initial budget within thirty days after reasonably projecting that the expenditures for any specific category will exceed the approved budget by ~~more than ten percent or two thousand dollars, whichever is greater unless a different threshold for amendment is prescribed by the court~~ A THRESHOLD AS PRESCRIBED BY THE ARIZONA JUDICIAL COUNCIL AND AS SET FORTH IN THE INSTRUCTIONS FOR THE CONSERVATOR’S BUDGET, AS ADOPTED IN THE ARIZONA CODE OF JUDICIAL ADMINISTRATION.”

Comment: Some individuals commenting on the rule petition raised concerns about the specified threshold of 10 percent or \$2,000, whichever is greater, particularly indicating this amount is too low and will result in increased costs to an estate. Since this is a new requirement, it is too soon to determine whether this threshold amount provides an appropriate balance between

updating the court on changes to an estate and ensuring estates do not incur unnecessary costs by increased filing requirements. The Council agreed that removing the threshold from the rule, but requiring in administrative code, with the Council's approval, provides a more efficient mechanism to periodically review and revise the threshold, if necessary.

**V. Rule 33. Compensation for Fiduciaries and ~~Attorney's Fees~~ Attorneys;
STATEWIDE FEE GUIDELINES**

1. The Council recommends approving amendments to Rule 33 with the following modified language to Rule 33(F):

“When determining reasonable compensation, the superior court shall follow the statewide fee guidelines set forth in THE ARIZONA CODE OF JUDICIAL ADMINISTRATION ~~Appendix B to these Rules.~~”

Comment: The Council agreed that placing the statewide fee guidelines in administrative code, rather than court rule, provides a more efficient mechanism to periodically review and revise the guidelines, if necessary.

W. Rule 38. ~~Appendix to~~ Forms

1. The Council recommends approving amendments to Rule 38 with the following modified language to Rule 38(B):

“Forms ~~5~~ 6 through 10 included in ~~Appendix A~~ THE ARIZONA CODE OF JUDICIAL ADMINISTRATION meet the requirements of these rules. Unless otherwise ordered by the court, forms ~~5~~ 6 through 9 shall be the exclusive method for presenting such matters in the

superior court. Form 10 can be used by a conservator only if authorized by the court to do so. The instructions included with forms 5 6 through 10 supplement the rules and have the same force and effect as the rules.”

Additionally, the Council recommends the proposed Rule should take effect from and after September 1, 2012 to allow sufficient time for staff to review the proposed forms, make any necessary revisions to the forms, present the forms to the Council for approval, and to make the forms available on the judicial branch’s website.

Comment: As previously noted, the Council agreed placing any approved forms in the administrative code, rather than court rule, provides a more efficient mechanism to revise such forms at a later date, if necessary. Moreover, since the Council recommended against approving Rule 30.1 (i.e. Good Faith Estimate; Form 5), language in proposed Rule 38(B) needs to be modified to remove the requirement to use Form 5.

X. THE ARIZONA RULES OF THE SUPREME COURT

1. Rule 31. Regulation of the Practice of Law

- a. The Council recommends against approving proposed amendments to Rule 31, identified as Option 1 in the rule petition.
- b. The Council recommends approving amendments to Rule 31; specifically, Rule 31(D)(30), identified as Option 2 in the rule petition, with the following modified language:

“NOTHIING IN THESE RULES SHALL PROHIBIT A
PERSON LICENSED AS A FIDUCIARY PURSUANT
TO A.R.S. § 14-5651 AND PERFORMING SERVICES
IN COMPLIANCE WITH RULE 10.1, ARIZONA RULES

OF PROBATE PROCEDURE AND ARIZONA CODE OF JUDICIAL ADMINISTRATION, PART 7, CHAPTER 2, SECTION 7-202. THIS EXEMPTION IS NOT SUBJECT TO PARAGRAPH (C) OF THIS RULE AS LONG AS THE DISBARRED ATTORNEY OR MEMBER HAS BEEN LICENSED AS A FIDUCIARY PURSUANT TO A.R.S. § 14-5651 AND THE ARIZONA CODE OF JUDICIAL ADMINISTRATION, PART 7, CHAPTER 2, SECTION 7-202. ~~NOTWITHSTANDING THE FOREGOING PROVISION, THE COURT MAY REQUIRE REPRESENTATION BY AN ATTORNEY WHENEVER IT DETERMINES THAT LAY REPRESENTATION IS INTERFERING WITH THE ORDERLY PROGRESS OF THE PROCEEDINGS OR IMPOSING UNDUE BURDENS ON OTHER PARTIES. IN ADDITION, THE COURT MAY ASSESS AN APPROPRIATE SANCTION AGAINST ANY PARTY OR ATTORNEY WHO HAS ENGAGED IN UNREASONABLE, GROUNDLESS, ABUSIVE OR OBSTRUCTIONIST CONDUCT.~~"

Additionally, the Council recommends the proposed rule amendment should take effect Rule 31(d)(30) should have an effective date of September 1, 2012 to allow sufficient time for staff to revise the pertinent sections of administrative code, seek public comment, and submit for review and approval to Council subcommittees and the Council.

RESPECTFULLY SUBMITTED this 10th day of November, 2011.

Lorraine Smith
On Behalf of the Arizona Judicial Council